MOTION FILED

CASE NO. 80-2043

JUL 7 1981

IN THE

Supreme Court of the United States

October Term, 1980

BOARD OF EDUCATION,
ISLAND TREES UNION FREE
SCHOOL DISTRICT NO. 26, ET AL.

Petitioners

vs.

STEVEN A. PICO, ET AL.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., AND BRIEF IN SUPPORT OF THE PETITIONERS FOR WRIT OF CERTIORARI

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CASE NO. 80-2043

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM.

Petitioners

vs.

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS; and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE BY CHARLES H KEATING, JR. AND CITIZENS FOR DECENCY THROUGH LAW, INC., AND BRIEF IN SUPPORT OF THE PETITIONERS FOR WRIT OF CERTIORARI

Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this Honorable United States Supreme Court, pursuant to Court Rule

36, for leave to file a brief as Amicus Curiae in support of the Petitioners, on or before the 3rd day of June of 1981.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty years in the enforcement of law regulating and combating the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the United States. Citizens for Decency through Law, Inc. (CDL), is a non-profit, non-sectarian, and

non-political organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assitance to prosecutors and law enforcement personnel.

Moving Party was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in the "Report of Charles H Keating, Jr.,

Commissioner", which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by the membership of one hundred forty-six past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers, who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of obscenity laws is evidenced by his

having been plaintiff on behalf of the State of Ohio in an obscenity nuisance abatement action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

Moving Party and CDL have also filed briefs amicus curiae in this Court urging that obscenity laws or convictions be upheld: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 1052 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966); Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 447,

1110 (1973); Heller v. New York, 413, U.S. 483, 37 L.Ed.2d 745, 1225 (1973); Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 1295 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); and Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980).

Furthermore and most recently, this attorney represented the Respondents, State of Ohio, in the case of Flynt v. Ohio, No. 80-420, decided May 18, 1981.

Moving Party hopes to urge as amicus curiae that although the Respondents herein had, in their status as students in the Island Trees Union Free School District No. 26, a protectable First Amendment entitlement, that entitlement was subject to and limited by the reasonable exercise of certain statutory directives by the

Petitioners, and furthermore, because of the limited nature of Respondents entitlement it was not subject to scrutiny under the Due Process Clause of the Fourteenth Amendment.

It is sincerely hoped that this Court will grant our Motion for Leave to File Brief as Amicus Curiae and allow us to participate in this cornerstone case which presents important issues for all the people of the United States as well as those of the State of New York.

Respectfully submitted,

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CITIZENS FOR DECENCY
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BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS

LAW AND ARGUMENT

Proposition of Law No. 1
DO RESPONDENTS, IN THEIR STATUS AS STUDENTS IN THE ISLAND TREES SCHOOL DISTRICT NO. 26, HAVE A FIRST AMENDMENT RIGHT GREATER THAN THAT RIGHT GIVEN THE PETITIONERS TO MANAGE AND CONTROL SAID UNION FREE SCHOOL.

Although the Respondents in their status as citizens have the same qualified First Amendment protection as that granted to both the sources of a communication and their recipients, [Va.

St. Bd. of Pharmacy v. Va. Cit. Cons. Council, 425 U.S. 748 (1976)], Respondents in their status as students have something less than that granted to other citizens. In Tinker v. Des Moines School District, 393 U.S. 503 (1969), this Court stated (at 506), "[F]irst Amendment rights applied in the light of the special characteristics of the school environment, are available to teachers and students".

Some of the "special characteristics" found in a "school environment", which are usually not present outside that environment, include the ability of the state "to transmit the basic values of the community", James v. Board of Education, 461 F.2d 566, 573 (2d Cir.), cert. denied 409 U.S. 1042 (1972), and the ability of the school to fulfill its

"responsibility to promote standards of decency and civility among school children". Thomas v. Board of Education, 607 F.2d 105, 113 (1977).

Professor Laurence H. Tribe in his treatise on American Constitutional Law acknowledges the "special characteristics of the school environment" when he states:

> [P]ublic facilities like schools and libraries, created not primarily for public interchange but for purposes closely linked to expression have been treated as 'semi-public forums', with government enjoying power to preserve such tranquility as the facilities' central purpose requires - a power that would be denied in a true public forum - but no power to exclude peaceful speech or assembly compatible with that constitutional law. (Tribe, American Constitutional Law p. 690, (1978). (Emphasis added.)

Acknowledging that First Amendment rights do not stop at the "schoolhouse gate", Healy v. James, 408 U.S. 169, 180

(1971), quoting Tinker, supra, but recognizing that because of the nature of a school, its "semi-public" purpose, and its "special characteristics" that allows governments to "preserve such tranquility as the facilities' central purpose requires", Amici contends that the Respondents' First Amendment protection while on the school grounds is not only qualified but is subject to and limited by the reasonable regulations of the local school board.

The Petitioners', pursuant to Section 1709, and subdivision 1 of section 701 of the New York Education Law, were given a statutory duty to: (1) describe the course of study; (2) prescribe the textbooks; (3) take charge and possession of the books; and (4) manage and control the schools.

To fulfill this statutory mandate

and to carry out their ". . . responsibility to promote standards of decency and civility among school children", (Thomas, supra), Petitioners removed certain reading materials, which they believed to be objectionable, and which they believed to be contrary to the "central purpose" of the school, from the library shelves.

In accomplishing this, the Petitioners did not prohibit discussion of the removed materials in or outside the classroom, nor did they prohibit the private possession of the materials by the teachers or students. All the Petitioners did was prohibit the accessibility of the materials in the school library. This was clearly a reasonable exercise of the Petitioners duty imposed upon them by statute and common law.

Furthermore, as this reasonable exercise of power by the Petitioners is compared with the qualified and limited First Amendment privilege enjoyed by the Respondents, in their status as students, it is clear that the exercise of the one was not an overburden on the enjoyment of the other.

Proposition of Law No. 2
DID RESPONDENTS IN THEIR STATUS AS STUDENTS HAVE A SUFFICIENT FIRST AMENDMENT ENTITLEMENT DEMANDING PROTECTION BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The requirements of procedural due process apply only to deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property, [Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)], and one of the many "liberty" rights encompassed within the Fourteenth Amendment includes the freedom of

expression, Gitlow v. New York, 268 U.S. 652 (1952).

Therefore, subject to the limitations and qualifications in Amici's first argument, it is granted that Respondents have a limited entitlement protectable under certain circumstances by the Fourteenth Amendment.

However, because of these limitations and qualifications, Respondents did not have a "liberty" interest sufficient to require the School Board to grant them a hearing when they decided to remove the books, and therefore, any "liberty" deprivation suffered by the Respondents was only "de minimis" and not protected.

The deprivation was "de minimis" because of the nature of the limited interest itself and also as this Court

said regarding the respondent in Roth, supra, at page 567, "It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains free as before to seek another". The Respondents here remained free, as before, to seek another book in possibly a public library or, at least, by purchase from a private book dealer.

The "nature" of Respondents' entitlement was presented in the Amici's first argument, and as this Court stated, ". . . in determining whether due process requirements apply in the first place we must look not to the 'weight' but to the nature of the interest at stake". Goss v. Lopez, 419 U.S. 565, 569 (1975), citing Roth, supra, at 570-571 (Emphasis added). In examining again the "nature of the

interest at stake", it has been clearly demonstrated that the Respondents were not, in this instance, entitled to due process protection.

However, even though the Respondents were not entitled to due process protection, the Petitioners on their own did allow imput from a committee established by them to assist them in their decision. Though the Petitioners later disregarded many of the recommendations of the committee is immaterial because: (1) they did not have to provide any procedure to begin with; and (2) they were under no mandate (nor could they have been) to accept the recommendations of the committee.

Therefore, even assuming that this Court determines that some process was due, the procedures established by the Petitioners were sufficient to protect

the limited rights of the Respondents and were ". . . appropriate to the nature of the case". Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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CERTICIATE OF SERVICE

Three copies of the foregoing Motion for Leave to File a Brief of Amicus Curiae by Charles H Keating, Jr., and Citizens for Decency through Law, Inc., and Brief in Support of the Petitioners for Writ of Certiorari were mailed this 2nd day of July of 1981 to the following:

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